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IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

AMERICAN BITUMINOUS POWER  
PARTNERS, L.P., a Delaware limited  
partnership

Plaintiff,

vs.

Civil Action No. 18-C-130

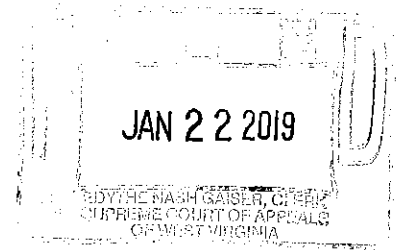
HORIZON VENTURES OF  
WEST VIRGINIA, INC.,  
a West Virginia corporation,

Defendants.

**RESPONSE OF THE DEFENDANT,  
HORIZON VENTURES OF WEST VIRGINIA, INC.,  
TO MOTION TO REFER CASE TO THE  
BUSINESS COURT DIVISION OF THE PLAINTIFF**

The defendant, Horizon Ventures, by Counsel, Gregory H. Schillace, Pursuant to Rule 29.06(a)(4) of the West Virginia Trial Court Rules, responds to the Motion of the plaintiff, American Bituminous Power Partners, L.P., to refer the above styled Civil Action to the Business Court Division. The defendant, Horizon Ventures of West Virginia, Inc., objects to the referral to the Business Court Division as the above styled civil action does not present any technological or commercial issues that are of such a nature to require any specialized treatment.

The above styled Civil Action is the most recent chapter in the ongoing struggle of the defendant, Horizon Ventures of West Virginia, Inc., to compel the plaintiff, American Bituminous Power



Partners, L.P., to pay rent in accordance with the November 28, 1989 Amended and Restated Lease Agreement and all of the subsequent modifications to that agreement. As a consequence of primarily the refusal to pay rent, the defendant, Horizon Ventures of West Virginia, Inc., was compelled to institute litigation against American Bituminous Power Partners, L.P. in the following matters:

- (A) Horizon Ventures of West Virginia, Inc. v. American Bituminous Power Partners, L.P., Civil Action No. 94-43-C (Keeley), United States District Court of Northern West Virginia. (Resolved upon agreement by American Bituminous Power Partners, L.P., to pay rent owed as well as other costs);
- (B) Horizon Ventures of West Virginia, Inc. v. American Bituminous Power Partners, L.P., Civil Action No. 96-C-32, Circuit Court of Ohio County, West Virginia. (Resolved pursuant to the agreement to resolve pending litigation between American Bituminous Power Partners, L.P., and Horizon Ventures of West Virginia, Inc. of May 28, 1996. This agreement required American Bituminous Power Partners, L.P., to pay accrued rent);
- (C) Horizon Ventures of West Virginia, Inc. v. American Bituminous Power Partners, L.P., et al, Civil Action No. 13-C-196, Circuit Court of Ohio County, West Virginia. (dismissal without prejudice with respect to rent based upon the absence of consent by senior debt holders of American Bituminous Power Partners, L.P. to the filing of the civil action).

Horizon Ventures of West Virginia, Inc. also filed the Civil Action styled. Horizon Ventures of West Virginia, Inc. v. American Bituminous Power Partners, L.P., Civil Action No. 18-C-76, Circuit Court of Marion County, West Virginia. This civil action, for which there has been no request for referral to the Business Court Division, is limited to enforcement of the June 25, 1987 contractual agreement between American Bituminous Power Partners, L.P. and Horizon Ventures of West Virginia, Inc. requiring the

payment by American Bituminous of an annual consulting fee.

The 2018 action filed by the defendant does not involve issues related to the failure of American Bituminous Power Partners, L.P., to pay rent in accordance with the Lease Agreement and all modifications thereto as Horizon Ventures of West Virginia, Inc. had not yet obtained permission to institute a civil action based upon a failure to pay rent from the holders of senior debt owed by American Bituminous Power Partners, L.P. This limitation upon Horizon Ventures of West Virginia, Inc., is now eliminated as American Bituminous Power Partners, L.P. filed this action.

The plaintiff, American Bituminous Power Partners, L.P., instituted the above styled civil action on or about August 27, 2018. Despite the above style action being filed in August of 2018 service through the West Virginia Secretary of State was not attempted upon Horizon Ventures of West Virginia, Inc. until December 14, 2018.

The 2013 civil action was the subject of the unpublished memorandum decision styled: American Bituminous Power Partners, L.P., the Horizon Ventures of West Virginia, Inc., 2015 WL 2261649(W.Va. Sup.Ct. May 13, 2015). In the memorandum decision the transfer of the 2013 action, upon remand, to the Business Court Division of the Circuit Court of Ohio County was directed.

Following transfer, the Business Court Division of the Circuit Court of Ohio County determined that Horizon Ventures of West Virginia, Inc. could not pursue any cause of action related to the

failure to pay rent as permission from the holders of senior debt was not obtained. The holders of senior debt intervened in the 2013 civil action following the issuance of the memorandum decision.

The complexity of the dispute between Horizon Ventures of West Virginia, Inc. and American Bituminous Power Partners, L.P. discussed in 2015 memorandum decision has been greatly simplified. After remand, the Business Court Division determined that the debt owed to the bank group, comprised of five (5) financial institutions of which Deutsche Bank A.G. New York Branch acts as agent, was "senior debt" as defined in the agreements between the parties, eliminating any issue with the intervening banks. As of December 31, 2018 the senior debt totals approximately \$9,500,000.00.

A substantial factor which previously complicated the refusal to pay rent was the existence of the remaining balance owed on \$150,000,000.00 of the Solid Waste Disposal Facility Revenue Bonds. These Revenue Bonds matured and were fully satisfied October 1, 2017, therefore, this issue no longer exists.

Accordingly, the complexity articulated in the Memorandum Decision involving the financial relationship between the bonds which were outstanding at that time and the five (5) banks acting through Deutsche Bank which guaranteed the bond payments have been eliminated. Horizon Ventures of West Virginia, Inc. recognized in its answer and counterclaimed in the above styled action that the

remaining "senior debt" owed to the bank group led by Deutsche Bank must be satisfied prior to payment of rent to Horizon Ventures of West Virginia, Inc.

American Bituminous Power Partners, L.P. instituted the above styled civil action seeking a determination pursuant to the agreements and modifications of agreements between American Bituminous Power Partners, L.P., and Horizon Ventures of West Virginia, Inc. have managed to be calculated at 1% of monthly gross revenue. Horizon Ventures of West Virginia, Inc. filed a counterclaim requesting recognition that it is entitled to rent at the 2.5% of monthly gross revenues.

The appropriate percentage of rent is not complicated or complex and does not necessitate any need for any specialized knowledge or expertise on the part of the Court. Accordingly, referral to the Business Court Division is unnecessary.

Another complicating issue with respect to the 2013 civil action involved the payment regarding the costs of reclamation on these premises. This issued was fully resolved and is not at issue in the above styled civil action by a trial and jury verdict in the 2013 civil action.

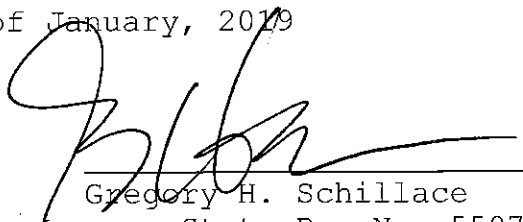
On March 20, 2018 a jury returned a verdict in favor of Horizon Ventures of West Virginia, Inc. regarding the claims of American Bituminous Power Partners, L.P. for reclamation payments. Although American Bituminous Power Partners, L.P. filed a notice of appeal with respect to this verdict that notice of appeal was

subsequently withdrawn.

Based upon the forgoing, the above styled civil action does not meet the criteria for referral for the Business Court decision pursuant to Rule 29.04(a)(2) of the West Virginia Trial Court Rules. This dispute does not require any specialized treatment to improve the expectation of a fair and reasonable resolution.

**WHEREFORE**, the defendant, Horizon Ventures of West Virginia, Inc., respectfully requests that the motion to refer case to the Business Court Division be denied.

Dated this 18th day of January, 2019



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Gregory H. Schillace  
State Bar No. 5597

Counsel for Defendant

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